Providence College *and* Service Employees International Union, Local 134, AFL–CIO. Cases 1–CA–39493 and 1–CA–39547

October 31, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On November 14, 2002, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in support of the judge's decision and a brief in response to the Respondent's exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Providence College, Providence, Rhode Island, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"Denying employees the opportunity to take certain days as vacation days in retaliation for the Union's decision to take paid holidays as provided for in the contract."

2. Substitute the following for paragraph 2(a).

"Within 14 days after service by the Region, post at its facility in Providence, Rhode Island, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since November 14, 2001."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C., October 31, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] There were no exceptions to the judge's dismissal of allegations that the Respondent violated the Act by refusing to grant the Union's secretary treasurer's request for an 18-month unpaid leave of absence.

We agree with the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) by its denial of the day before Thanksgiving as a vacation day in retaliation for the Union's decision to take Veterans Day as a holiday in 2001. We therefore modify the judge's Order to more accurately reflect this finding.

[4] We will modify the judge's recommended order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). In addition, we will also modify the judge's remedy to provide that employees who suffered losses as a result of the Respondent's unilaterally changing its staffing policy at men's ice hockey games be made whole as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (1971), with interest as computed according to *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit or protection

Choose not to engage in any of these protected activities.

WE WILL NOT deny employees the opportunity to take certain days as vacation days in retaliation for the Union's decision to take paid holidays as provided for in the contract.

WE WILL NOT be unreasonably dilatory in turning over to the Union information it requests that is relevant and necessary for the Union to carry out its collective-bargaining responsibilities.

WE WILL NOT unilaterally, and without giving prior notice and opportunity to bargain to the Union, modify an agreement on the staffing of men's ice hockey games.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed to you under the National Labor Relations Act.

WE WILL make whole those employees represented by the Union who suffered financial losses as a result of the unlawful change to the procedure regarding the staffing of men's ice hockey games.

WE WILL reinstate the agreed-upon procedure regarding coverage of men's ice hockey games unless and until the parties have reached agreement on a new procedure or have bargained in good faith to impasse.

PROVIDENCE COLLEGE

A. Susan Lawson, Esq., for the General Counsel.
William E. Smith and *John D. Doran, Esqs.*, of Providence, R.I., for the Respondent.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On November 14, 2001 and December 7, 2001, Service Employees International Union, Local 134, AFL–CIO (the Union), filed unfair labor practice charges in Cases 1–CA–39493 and 1–CA–39547, respectively, against Providence College (the Respondent).

On February 26, 2002, the National Labor Relations Board, by the Regional Director for Region 1, issued a consolidated complaint (complaint), which was amended on May 23, 2002, in Cases 1–CA–39493 and 1–CA–39547 in which the Respondent is alleged to have violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act.

The Respondent filed an answer in which it denied that it violated the Act in any way.

A hearing was held before me in Pawtucket, Rhode Island, on June 10, 11, and 12, 2002.[1]

Based on the entire record in this case to include my observation of the witnesses and their demeanor and after considering the brief filed by the General Counsel and the brief and reply brief filed by the Respondent, I make the following

FINDINGS OF FACT

At all material times, Respondent, a corporation with an office and place of business in Providence, Rhode Island, has been engaged in the operation of a college.

Respondent admits, and I find, that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

THE ALLEGED UNFAIR LABOR PRACTICES

A. Overview

The Union has represented a unit of approximately 40 to 44 physical plant employees at Providence College for many years.

The parties had a collective-bargaining agreement, which was effective July 1, 1999 to June 30, 2001. The parties operated without a written contract from June 30, 2001, until they agreed to a new collective-bargaining agreement in March 2002.

The Respondent, on September 6, 2001, following the expiration of the contract on June 30, 2001, notified the Union that it was exercising its lawful right to no longer enforce the "Union Security" clause and the "Dues Check-off" clause and that it would not arbitrate any postcontract expiration grievances filed by the Union.

It is alleged that Respondent committed four unfair labor practices, which will be treated separately. They are (1) Respondent's refusal in September 2001 to grant in full Union Secretary Treasurer Charles Wood's request for an 18-month unpaid leave of absence; (2) Respondent's decision on November 9 and 13, 2001 to deny employees the right to take November 21, 2001, the day before Thanksgiving, as a vacation day; (3) Respondent's decision on November 15, 2001, to modify the past practice regarding overtime pay for physical plant employees covering men's ice hockey games; and (4) Respondent's delay from March 22, 2001 to February 20, 2002, in turning over information requested by the Union in connection with a grievance involving overtime pay for physical plant employees performing snow removal duties.

[1] After the record was closed I received in evidence as GC Exh. 47 two documents, i.e., p. C9 from the January 13, 2001 issue of the Providence Journal, a general circulation newspaper, and a copy of the Holy Cross College 2000–2001 Ice Hockey Schedule.

B. Respondent's Refusal to Grant in Full Union Secretary-Treasurer Charles Wood's Request for an 18-month Unpaid Leave of Absence

Charles Wood was elected secretary treasurer of the Union on August 28, 2001.

Section 13(b) of the collective-bargaining agreement, which the parties were operating under although it had expired on June 30, 2001, provided as follows:

> (b) Union Business. At the written request of the Union, the Employer shall grant either an officer of the Union or a duly elected or appointed representative of the Union, not to exceed one (1) employee at any one time, a leave of absence without pay for a period not to exceed one (1) year or the period of elected office, provided that such leave will not interfere with the operations covered by this Agreement. The purpose of this leave is to permit the representative to work for the International, District Council and/or the Local Union on Union business. During the period of such a leave of absence an employee will not accrue seniority, nor will the Employer have any obligation for continuation of benefits as specified elsewhere in this Agreement. Such leaves may be extended upon written request thirty (30) days prior to the termination thereof.
>
> At the written consent of the Union, employees, not to exceed two (2) at any one time, shall be granted days off without pay for attendance at the Union's National Convention, State Convention, AFL-CIO Conventions and/or the Union's District Convention provided that the absence of such employees will not interfere with the operations covered by this Agreement.

A clause similar to Section 13(b) had been a part of the contract between Respondent and the Union for a number of years.

However, no one had ever made a request for a leave of absence of more than a few days to attend a union convention.

On August 29, 2001, Wood sent to Kathleen Alvino, the executive director of human resources, the following memo:

> Dear Ms. Alvino:
>
> This will serve to inform you that I have been elected to the position of Financial Secretary-Treasurer of Local 134 of the Service Employees International Union.
>
> In accordance with Section 13 (Unpaid Leave) subsection (b) of the Collective Bargaining Agreement between our union and Providence College, I hereby request an unpaid leave of absence, effective September 17, 2001, for the term of elected office, which extends until March 2003.

On September 7, 2001, Alvino answered Wood's letter. The letter provided, in part, as follows:

> Dear Charlie:
>
> The College has received your request for an unpaid leave of absence under Article 13b of the Collective Bargaining Agreement.
>
> While the College has grave concerns about its ability to meet the operational demands of the Physical Plant department, and our ability to attract qualified replacement personnel, we, nevertheless, will provide a one-year leave of absence effective September 17, 2001 with an end date of September 16, 2002. At that time, you will have the right to apply for an extension of three months. We will consider the merits of that request, if made, at that time. At the end of your leave of absence, if you do not return to your position, your employment with the College will be terminated.

On September 12, 2001, Wood requested in writing that Alvino reconsider his request for unpaid leave, which was denied.

The Union filed a grievance, which Respondent by Warren Gray, assistant vice president for business services, denied. As noted above, the contract between the Union and Respondent had expired on June 30, 2001. Respondent had exercised its right not to arbitrate postcontract expiration grievances.

The person who denied Wood's request for the 18-month-unpaid leave of absence was Respondent's executive director of human resources, Kathleen Alvino.

As noted no employee had ever requested a leave of absence for this length of time so the interpretation of the contract became a case of first impression.

Alvino testified that she interpreted Section 13(b) to permit Respondent to grant a leave of absence of no more than 1 year. The Union and General Counsel argue that the contract permits a leave of absence up to 1 year "or the period of elected office" which for secretary treasurer would be 18 months.

One thing is clear: Section 13(b) allowed Respondent to deny a leave of absence of any length of time if the leave of absence would interfere with operations covered by the collective-bargaining agreement.

In other words Respondent did not deny the leave of absence in its entirety on the grounds that the leave would interfere with operations but granted it for a full 1-year period with leave to apply for a 3-month extension.

Neither interpretation of Section 13(b) is irrational. Although if the "period of elected office" were 5 or 10 years the interpretation given to Section 13(b) by the Union and General Counsel would not make a lot of sense. There is no evidence that the Union has any office whose term exceeds 18 months.

Accordingly, I find no violation of the Act unless Respondent interpreted Section 13(b) the way they did because of union animus.

Alvino who had been in her job for only 6 months when presented with this issue testified that union animus did *not* motivate her to interpret the contract to give Wood less than he requested. I found Alvino to be a credible witness.

I credit Alvino that she made the decision to grant the requested leave of absence in large part but not in its entirety without input from anyone even suspected of union animus.

The only evidence of Alvino's antiunion or anti-Charles Wood sentiment is that she sent a letter on July 18, 2001 to Wood who was on disability leave asking him to submit a Doctor's note that he was physically fit enough to come on campus and participate in negotiations. Alvino sent the letter after consulting with Respondent's general counsel (not one of the lawyers in this case) because of the Respondent's concern about liability in connection with an employee on medical leave being

on campus. Wood ignored the letter, which he considered to be harassment, and Alvino never followed up on it.

Wood also wrote a letter to a local newspaper, i.e., the Providence Journal, which published his letter to the editor in the paper on July 29, 2001. Wood's letter was critical of the college (GC Exh. 19). There is no evidence, however, that Alvino ever saw this letter much less was influenced by it.

Accordingly, I find that Respondent did not violate the Act when it granted Wood a 1-year unpaid leave of absence rather than an 18-month unpaid leave of absence because I find Respondent gave a rational explanation for its interpretation to Section 13(b). And this interpretation was not motivated by union animus. Respondent, if it wanted to truly "get" the Union or Charles Wood, could have denied the requested unpaid leave of absence in its entirety claiming that operations prohibited any leave whatsoever. Respondent did not do that.

In its answer, Respondent moved that this part of the complaint be deferred to the arbitral process but the General Counsel and Union opposed deferral because Respondent had previously refused (lawfully) to arbitrate this dispute.

It is quite possible that this issue may arise in the future and it may be appropriate at that time to defer to the arbitral process and have an arbitrator interpret the meaning of Section 13(b) which can rationally be interpreted to mean what Respondent claims it means, i.e., no unpaid leave of absence for more than 1 year or mean what the General Counsel and Union claim it means, i.e., an unpaid leave of absence can be granted for no more than one year or for the period of the elected office if that period is for a period of time longer than 1 year.

C. Respondent's Decision to Deny Vacation Time on November 21, 2001, the Day Before Thanksgiving

Section 8(g) of the collective-bargaining agreement that ran from July 1, 1999 to June 30, 2001, provided, in pertinent part, as follows on the subject of holidays:

> (g) Holidays. The following days, or the day following each of them falling on a Sunday, shall be recognized as holidays, whether or not a regularly scheduled work day, all of which shall be with pay at straight time for full-time employees..
>
> | | |
> |---|---|
> | New Year's Day | Labor Day |
> | Martin Luther King, Jr. Day | Columbus Day |
> | Memorial Day | Veterans Day |
> | Independence Day | Thanksgiving Day |
> | VJ Day | Christmas Day |
>
> Any full-time employee required to work on one of the said holidays, whether or not it is a scheduled workday for such employee, shall receive, in addition to his holiday pay, payment at time and one-half for the hours actually worked on such a holiday.
>
> The following days shall be days off with pay (but not holidays):
>
> Day After Thanksgiving
> Day Before Christmas
> Designated Monday in February tied to the College Winter Weekend
> Good Friday

The contract expired on June 30, 2001 and the parties commenced negotiations for a successor agreement, which they agreed to in March 2002. The provisions on holidays remained the same during the period between June 30, 2001 and agreement on a new contract.

Veterans Day was a school day at the college, i.e., students were on campus and classes were held. The day before Thanksgiving was not a holiday but no classes were held and the students were off and free to go home or elsewhere for Thanksgiving. Needless to say, it made sense from the college's point of view to make the day before Thanksgiving the holiday rather than Veterans Day.

During negotiations for the new contract Respondent did indeed propose that the employees switch holidays, i.e., work on Veterans Day and have the day before Thanksgiving off as a holiday instead. A practice had earlier developed whereby the employees would vote on whether to take Veterans Day as the holiday or the day before Thanksgiving.

On November 9, 2001, the Union advised Respondent that the Union had decided not to take a vote in 2001 and to take as the holiday Veterans Day and have the day before Thanksgiving be a workday.

If a particular day was not a holiday but was a regular workday the employees could request to take a vacation day on that day. The only time employees were not allowed to take vacation was the several week period prior to the opening of school in the late summer.

In other words the employees would be off on Veterans Day as a holiday on November 12, 2001, but could take off the day before Thanksgiving, November 21, 2001, as a vacation day.

When Respondent found out that the Union was taking Veterans Day as the holiday it immediately announced to the Union at a meeting with union representatives on November 9, 2001 that no one could take the day before Thanksgiving as a vacation day unless it had already been approved.

The reason given was the large backlog of work orders. On November 13, 2001, a notice to all physical plant employees was posted advising employees that no one could take the day before Thanksgiving as a vacation day in 2001 due to work requirements.

Two physical plant employees thereafter and unaware of management's decision requested the day before Thanksgiving off as a vacation day. They were Martin Tobin and Ed Hart, and their requests to take the day off as a vacation day were denied. Both men worked the day before Thanksgiving and credibly testified that nothing was out of the ordinary at work that seemed to necessitate the day before Thanksgiving being denied as a vacation day. It was just a regular day with no unusual amount of work orders.

Jack McCarthy, Director of the Physical Plant, made the decision to deny vacation requests for the day before Thanksgiving except for those already granted. McCarthy did not testify before me and no explanation was offered for his nonappearance such as illness, etc.

Charles Haberle, an assistant vice president for academic administration, testified for Respondent to support its argument that work needed to be done in Feinstein Hall, a building on campus, on the day before Thanksgiving.

Haberle impressed me as a credible witness and did identify work to Jack McCarthy that needed to be done in Feinstein Hall. Specifically he informed McCarthy that chairs needed to be rearranged, i.e., there were too many in some classrooms and too few in other classrooms and some chairs were broken, ceiling tiles needed to be replaced and some painting needed to be done. This was brought to McCarthy's attention prior to the announcement that employees could not take the day before Thanksgiving as a vacation day.

Haberle testified that when he inspected Feinstein Hall after the Thanksgiving break he saw some improvement. Haberle observed much more improvement to Feinstein Hall as a result of work done over the Christmas holiday break.

Shop Steward Pasco Lepore credibly testified that although he had a personal backlog of work orders because his participation in negotiations kept him from his regular duties he was not aware of any backlog of work orders and he testified that his supervisor, Dave Hamilton, never told him about any backlog of work orders. Hamilton did not testify.

The Friday, Saturday, and Sunday after Thanksgiving were days off and no one in the physical plant department was asked to work those days on overtime.

Haberle toured Feinstein Hall and printed out what he wanted done *after* the decision to deny employees the right to take the day before Thanksgiving as a vacation day had been made.

Martin Toupin wanted to leave town for Thanksgiving and requested the Monday, Tuesday, and Wednesday before Thanksgiving off. He was granted leave for Monday and Tuesday but not Wednesday. He cancelled his out-of-town plans. Toupin is a locksmith and the day before Thanksgiving was not different for him than any other day. He was never refused vacation time before for the day before Thanksgiving. On Wednesday he doesn't remember even going to Feinstein Hall.

Edward Hart was also denied the right to take a vacation day on Wednesday and had taken that day off in the past. He received no special assignments that Wednesday.

In short there was no valid business reason to deny to employees the right to take off the day before Thanksgiving as a vacation day in 2001.

The timing of McCarthy's decision coming immediately after the Union informed him that the employees were taking Veterans Day as the holiday and not the day before Thanksgiving as Respondent was urging them to do in negotiations persuades me to conclude that the denial of the day before Thanksgiving as a vacation day was in retaliation for the Union's decision to take Veterans Day as the holiday in 2001 and was therefore done in violation of Section 8(a)(1) and (3) of the Act.

D. Information Request Case

On January 4, 2001 the Union filed a grievance under the provisions of the collective-bargaining agreement that ran from July 1, 1999 to June 30, 2001.

The grievance alleged that management did not call in all the snow removal men on the list and asked for compensation for the hours lost.

On February 21, 2001 the grievance was denied and pursuant to the terms of the contract, the Union made a demand for arbitration. Respondent was prepared to arbitrate this grievance because it was filed prior to the expiration of the contract on June 30, 2001.

On February 23, 2001 the Union made the following information request:

> In order to prepare for arbitration, the union requests the following information relevant to the above grievance:
>
> 1. Dates of all storms in which snow removal personnel were called on to perform their tasks for the past four (4) years including 2001.
> 2. Overtime records of all Physical Plant personnel for those dates.
>
> You understand that the dates requested include salting and sanding subsequent to the conclusion of the snow removal effort and any other related endeavor.
>
> This request is made without prejudice to the union's right to file subsequent requests. Please provide the information by March 12, 2001.
>
> Thank you.

Respondent's answer on March 22, 2001, to the information request was made by Warren Gray, assistant vice president of business services, and was as follows:

> 1. In response to your request . . . I have provided Enclosure (1), which provides the dates for all storms inshich [sic] snow removal personnel were called to perform their tasks for the past 4 years. This list was prepared based upon the records I have found to date. If additional dates of storms is uncovered, I will forward that information to you.
>
> 2. You will also be provided with access to the overtime records for the dates of the snowstorms. Please contact me so I can arrange to have those records made available to you by the Physical Plant Director.
>
> 3. If you have any questions, you can reach me at ext. 1602.

At enclosure 1 Respondent listed one date in 1998, 13 dates in 1999, 6 dates in 2000, to 4 dates in 2001 as the dates when snow removal personnel were called into work.

The complaint, as amended, alleges that Respondent violated Section 8(a)(1) and (5) of the Act by its delay in turning over the requested information from March 22, 2001 to February 22, 2002.

It is clear that the information requested was necessary and relevant to the Union in carrying out its collective bargaining responsibilities and Respondent did turn over on February 22, 2002, all the information requested. Indeed some of it was turned over long before February 22, 2002.

A delay of 10 or 11 months warrants a finding of unreasonable delay and is a violation of Section 8(a)(1) and (5) of the Act.

Charles Wood and Kevin Buzzerio testified on the information request case.

Wood testified that he thought the list of dates provided in Enclosure 1 to Respondent's answer to the information request was incomplete. Wood told this to Buzzerio who didn't get back to him with a complete list of dates.

The then Director of Physical Plant Tom Smyth told Wood he could review records but had to do it on his own time. Wood pointed out that his mother had recently passed away and he had to take care of his elderly father. Respondent, manifesting good faith and decency, told Wood he could look up records during work hours and copy records at no cost.

On March 26, 2001 Respondent furnished Wood with a revised list of dates of snowstorms.

Payroll and timeclock records were made available to Wood in early April 2001 for photocopying but were incomplete since they only contained 2 not 4 years of records. The remaining records were filed down in what the parties called the "tunnel".

The arbitration on this grievance was scheduled for September 25, 2001.

Beginning in April 2001, Wood claims he spoke with Buzzerio every 2 weeks or so and asked if he got the remaining records as yet and Buzzerio said he hadn't gotten around to it as yet.

In July 2001 two briefcases containing records already turned over to Wood were stolen from his car and never recovered.

Respondent made those records available to Wood for recopying but he wanted to wait until all the payroll records were made available to him, i.e., not only those previously made available but the remainder of the records from the "tunnel".

During the summer the date for the arbitration hearing was changed at Respondent's request from September 25, 2001 to February 27, 2002.

As late as October 9, 2001, records were still not complete to be turned over to Wood. Wood went to Jack McCarthy, who did not testify, and McCarthy said he'd get what Wood needed.

Wood waited some more time and not having received the records filed an unfair labor practice charge on December 7, 2001.

Although the parties continued to dispute the dates of snow removal the information requested for all practical purposes was fully turned over by late January 2002 in time, but just in time, for the rescheduled arbitration hearing set for February 27, 2002, which went forward on that date. As of the time of the trial before me in June 2002 the parties were awaiting the arbitrator's decision following a 3-day hearing.

Buzzerio testified on the information request case for Respondent. Buzzerio claimed that he had made available to Wood all the requested information by August or September 2001 and told Wood it was available. Wood did not come in until late December 2001 or early January 2002 to copy what he needed. There were three or four more snow dates discovered at that time and Buzzerio turned that information over prior to the arbitration hearing.

Based on demeanor and reasonableness of their testimony I credit Wood over Buzzerio. If all the requested information was ready by August or September of 2001 and Wood advised of that then (1) Wood would have copied what he needed, and (2) Wood would not have filed the charge in the information request case on December 7, 2001 in Case 1–CA–39547 as he did.

The bargaining unit consisted of only 40 to 44 people and the number of snow days over the 4-year period was less than 50 days at the most. One can only imagine how many paydays came and went during this 11-month period. It should not have taken 11 months to provide the information that all parties to the litigation concede was necessary and relevant to the Union in carrying out its collective-bargaining responsibilities. Accordingly, I find that Respondent violated Section 8(a)(1) and (5) of the Act in its unreasonable delay in producing the requested information. See *NLRB v. Fitzgerald Mills Corp.*, 133 NLRB 877 (1961), enfd. 313 F.2d 260 (2d Cir. 1963), cert. denied 375 U.S. 834 (1963) where a 9-month delay warranted the finding of a violation.

E. Coverage of Men's Ice Hockey Games

The Respondent and the Union over a period of time had agreements on how employees in the physical plant department would cover men's ice hockey games.

Since the 1996–1997 season the parties agreed to cover men's ice hockey games, which were played in Schneider Arena on campus, in the following manner, i.e., all games would be covered on an overtime basis. More specifically one of the three building mechanics with a stationary engineer's license would cover the game on an overtime basis if a weekend game and during the week one of the three building mechanics with a stationary engineer's license would cover the game on a rotational basis and if the game was covered by the second-shift building mechanic who had a stationary engineer's license then one of the other three building mechanics without a stationary engineer's license would backfill the second-shift mechanic covering the game and do that part of the shift when the game was being played on an overtime basis.

On December 17, 1999 the Union filed a grievance over men's ice hockey game coverage claiming Respondent was not backfilling for the mechanic covering hockey games during the week. The grievance was settled on January 21, 2000 when Respondent decided to settle the grievance because the men's ice hockey season was fast drawing to a close. Respondent's letter by Warren Gray to the Union read as follows:

> 1. In response to your memo, Reference (1), and per our meeting of 1/21/00 in the Physical Plant, at this time, the College has decided not to eliminate the overtime coverage by the building mechanic at the hockey games played in Schneider Arena. This would appear to make this request and the need for arbitration on this matter mute (sic). The College will continue to review this matter as it pertains to the State or City's requirements for the operation of that facility.
>
> 2. If you have any more questions regarding this matter, please contact me.

Prior to the settlement of the grievance the Union requested from Facilities Engineer Harry C. Miller that the policy on men's ice hockey game coverage be put in writing. Miller did so. The policy as recorded in Miller's memo was as follows:

> SUBJECT: Procedure for Covering Hockey Games at Schneider Arena by Engineer
>
> Shortly after I became employed by Providence College, the City of Providence insisted that we implement a program to meet the College's legal responsibilities in this area.
>
> Because we have three Building Mechanics with Operating Engineer's licenses, and to be fair to the other Building Mechanics who don't possess that license, I, as a representative of the College, entered into the following agreement with the Stewards and the Building Mechanics:
>
> Building Mechanics with Operating Engineer's licenses will rotate the coverage of hockey games at Schneider Arena.
>
> During the normal work week, i.e. Monday through Friday, if it becomes the second shift Building Mechanic's turn in the rotation, and he covers the game, another Building Mechanic will handle his HVAC duties while he does the Engineer's 'watch.'
>
> Thank you.

The only time physical plant employees, including building mechanics, are required to work overtime is when show removal duties are needed. Accordingly, there could be occasions when a building mechanic could work overtime to back fill for the second shift building mechanic with a license covering a hockey game and no one was interested in working overtime.

There is no valid 10(b) defense just because on occasion no mechanic filled in on overtime for the second-shift mechanic with a license when he covered a night men's ice hockey game. There was no dispute between Respondent and the Union on hockey coverage during the 2000–2001 season, i.e., no grievances and no unfair labor practice charges.

At the beginning of the 2001–2002 season Respondent decided to cancel the policy of calling in nonlicensed building mechanics to cover for the second-shift mechanic with a license when he covered a hockey game during the week. The Union filed a grievance, which was denied on November 15, 2001, in the following letter:

> As we discussed at our meeting on Friday, November 9, 2001, the information and grievance resolution you referred to #991203, was predicated upon confirmation that there is a statutory requirement to provide coverage by an electrician and a building mechanic at ice hockey games on campus. There was no commitment to future coverage without that confirmation.
>
> It remains our intention to provide coverage by both trades, Monday through Friday, by the second shift electrician and the second shift building mechanic. On the weekend, overtime will be scheduled for both trades to provide coverage.
>
> While coverage by a building mechanic is being provided now, going forward it will be re-evaluated as soon as the new Carrier ice-marking system is turned over to the College and our mechanics are trained.
>
> Based upon the lack of evidence of any statutory requirements and the December 1999 and January 2000 correspondence between the College administration and the union, the grievance is denied.

On November 14, 2001 the Union filed a timely unfair labor practice charge regarding overtime coverage of men's ice hockey games.

Because the contract between the parties had terminated on June 30, 2001 Respondent lawfully elected to refuse to take any post contract termination grievances to arbitration.

The General Counsel called Lionel Delaney a chief mechanical inspector for the City of Providence as a witness and also introduced a copy of a City Ordinance. This ordinance supports the union position that the licensed building mechanic covering the hockey game had to stay in Schneider area and that a building mechanic to backfill for that mechanic was necessary since the mechanic covering the game couldn't leave the arena. Indeed, Delaney had communicated to Respondent in December 2001 the need to have a licensed mechanic on duty in the Schneider area to cover any event where 10 or more people were present.

The use of a nonlicensed mechanic to work overtime to backfill for the second-shift licensed mechanic when he covered a men's ice hockey game was agreed to between Respondent and the Union as far back as 1996 and Warren Gray conceded in his testimony that Respondent changed that agreement without giving prior notice and opportunity to the Union to bargain over it.

It is crystal clear that the Respondent in eliminating the use of a nonlicensed mechanic to backfill on overtime unilaterally implemented this change in the agreement between Respondent and the Union without giving prior notice and opportunity to bargain to the Union and, therefore, violated Section 8(a)(1) and (5) of the Act when it did so. It didn't bargain at all much less in good faith.

In its answer to the complaint Respondent proposed to defer this part of the case to the arbitral process but the General Counsel and Union objected since Respondent had previously lawfully elected not to arbitrate any post contract termination grievances.

F. Credibility of Warren Gray

I found Warren Gray, Respondent's assistant vice president for business services, to be credible.

The General Counsel pointed to several incidents that suggest Gray's animus toward Charles Wood.

In November 2000 Gray attended a meeting with Wood and others and when the subject of a Christmas party came up Gray stormed from the room saying, according to Wood, that "every-time I make a change you stick it up my ass." Gray admitted he left the meeting abruptly, was frustrated, and may well have said what Wood claimed he said but he testified before me that he bears no animus against Wood because they are both doing their job.

Also, in November 2000 Gray told Wood that employees should not wear SEIU union pins at work as they were doing. Wood said they could wear union pins. According to Wood, Gray said, "I have a memory like an elephant." Gray testified

that he checked with Respondent's attorney and learned, lo and behold, that Wood was correct. Gray didn't deny he said to Wood that he had a memory like an elephant. Again Gray claims no animus against Wood because they are both doing their job.

Evidence at the hearing from Wood was that he filed 30 grievances in a 2-year period.

I have found that Respondent violated the Act as set forth above and below but credit Gray with being credible.

REMEDY

The Respondent should be ordered to cease and desist from its unlawful conduct, post an appropriate notice, and make whole those employees represented by the Union who suffered monetary losses as a result of Respondent's unilaterally changing the way men's ice hockey games were staffed.

CONCLUSIONS OF LAW

1. Respondent, Providence College, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Service Employees International Union, Local 134, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (3) of the Act when it denied employees the opportunity to take the day before Thanksgiving in 2001 as a vacation day in retaliation for the Union not agreeing to substitute the day before Thanksgiving Day for Veterans Day as a holiday during negotiations.

4. Respondent violated Section 8(a)(1) and (5) of the Act when it was unreasonably dilatory in turning over to the Union information requested by the Union which was relevant and necessary to the Union in an upcoming arbitration hearing involving overtime pay for snow removal dates.

5. Respondent violated Section 8(a)(1) and (5) of the Act when it unilaterally and without giving the Union prior notice and opportunity to bargain modified the agreed-upon staffing arrangement for men's ice hockey games.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Providence College, Providence, Rhode Island, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying employees the opportunity to take certain days as vacation days in retaliation for the Union's position during negotiations.

(b) Being unreasonably dilatory in turning over to the Union information its requests that is relevant and necessary for the Union to carry out its collective-bargaining responsibilities.

(c) Unilaterally and without giving prior notice and opportunity to bargain to the Union modify an agreement on the staffing of men's ice hockey games.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Providence, Rhode Island, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 1 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Make whole those employees represented by the Union who suffered financial losses as a result of the unlawful change to the procedure regarding the staffing of men's ice hockey games.

(c) Reinstate the agreed-upon procedure regarding coverage of men's ice hockey games unless and until the parties have reached agreement on a new procedure or have bargained in good faith to impasse.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 14, 2002.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT deny employees the opportunity to take certain days as vacation days in retaliation for the Union's position during negotiations.

[2] If no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT be unreasonably dilatory in turning over to the Union information it requests that is relevant and necessary for the Union to carry out its collective-bargaining responsibilities.

WE WILL NOT unilaterally and without giving prior notice and opportunity to bargain to the Union modify an agreement on the staffing of men's ice hockey games.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 8 of the Act.

WE WILL make whole those employees represented by the Union who suffered financial losses as a result of the unlawful change to the procedure regarding the staffing of men's ice hockey games.

WE WILL reinstate the agreed-upon procedure regarding coverage of men's ice hockey games unless and until the parties have reached agreement on a new procedure or have bargained in good faith to impasse.

PROVIDENCE COLLEGE